



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO 281 OF 2017

MOSES KAMANDE NYAMBURA.....PLAINTIFF

VS

FRANCIS MUNYUA NGUGI.....DEFENDANT

JUDGEMENT

1. By an Originating Summons dated the 21.12.2010 the Plaintiff Moses Kamande Nyambura filed suit against the Defendant and sought the Court to extend the period for applying for the land control board consent for the transfer a portion of 0.10 acres measuring 90X56 feet wide adjacent to the Kangari/Muthithi tarmac road (herein after called the suit land) and comprised in Loc 6/Muthithi/1920 by the Defendant to the Plaintiff. Secondly that the Deputy Registrar of the High Court be authorised to execute the application for land control board consent on behalf of the Defendant for purposes of obtaining land control board consent.

2. The basis of his claim is stated to be that on the 4.6.2009 the Defendant sold to the Plaintiff the suit land for the price of Kshs 500,000/- out of which the Plaintiff paid to the Defendant the sum of Kshs 418,000/- leaving a balance of Kshs 82,000/- which he has declined to accept. The Plaintiff sought the Defendant to transfer to him the suit land and an order that the balance of the purchase price be deposited in Court.

3. On the 23.6.2015 the Plaintiff amended the originating summons and sought two questions for determination; that in the alternative the Plaintiff claims refunds of the purchase price in the sum of Kshs 418,000/- together with interest at 20%. Secondly who should pay the costs of the suit.

4. On the 26/9/11, the Court directed that the Originating summons filed be deemed as a plaint and the Replying affidavit be deemed as a defence and the suit be disposed by way of viva voce evidence.

5. In his evidence the Plaintiff stated that he entered into an agreement of sale with the Defendant on the 4.6.2009 for the sale of the suit land comprising of a 3-bedroom stone house, a shop and a water reservoir. That on signing of the agreement of sale he paid a deposit of Kshs 200,000/- vide bank transfer. The balance was payable on or before 31.11.2009? by which time the parties agreed that they were to attend the Land Board for purposes of obtaining consent to subdivide and transfer and ensure that the suit land is transferred to the Plaintiff. That he took possession of the suit land upon signing of the agreement for sale.

6. The Plaintiff avers that by 17.3.2010 he had paid the Defendant a total of Kshs 405,000/-. an additional payment of Kshs 13,000/- was paid bringing the total amount to Kshs 418,000/- by the 7.12.2010.

7. That later the Defendant refused to obtain land control board consent to transfer the land; denied acknowledgment of the payment of Ksh 218,000/- as well as refused to accept the balance of Kshs 82,000/-. That instead he demanded that he vacates the suit land. That he then filed suit to assert his rights pursuant to the agreement of sale aforesaid.
8. That during the pendency of the suit, the whole of the Land Loc 6 Muthithi/1920 was sold by public auction to a third party thus frustrating the agreement of sale hence the alternative prayer to seek refunds in the sum of Kshs 418,000/- together with interest as well as general damages for breach of contract equivalent to the current market price of the suit land to be ascertained by a qualified valuer. That he vacated the suit land in the year 2010.
9. The Defendant denied the Plaintiffs claim and stated in his replying affidavit filed on the 30.6.2011 that it is true that they entered into an agreement of sale for the sale of the suit land to the Plaintiff and acknowledged receipt through bank transfer of Kshs 200,000/- being deposit of the purchase price. That the Plaintiff failed to meet the condition of the sale agreement to pay the balance of Kshs 300,000/- on or before 31/11/2009? and so breached the said agreement. That he applied and obtained land control board consent to subdivide on 10/9/2009 in anticipation of completion of the transaction as contemplated by clause 5 of the agreement. That he hoped to apply for the land control board consent to transfer once the full purchase price was paid.
10. That the Plaintiff failed to complete the agreement on his part and on the 30/11/2010 demanded in writing through his lawyers that he vacates the suit land and in default he would be evicted. That 21 days later the Plaintiff was prompted to file this suit. That he denies ever receiving any monies from the Plaintiff and in particular the sum of Kshs 218,000/- as additional purchase price.
11. In response to the letter dated the 7/12/2010 he denied ever receiving the same and termed it a forgery conjured by the Plaintiff and his advocate as a reaction to his letter dated 30/11/2010 demanding that he vacates the suit premises. He denied receiving Kshs 100,000/- in cash in the presence of the Plaintiff's advocate one Mr Kinuthia in his office. That on 2/6/11 he lodged a complaint in respect to the acknowledgement letter dated 17/3/2010 complaining of the forgery of his signature on the said document. That at the time of trial he had not received the outcome of the investigations from the DCIO, Muranga.
12. He urged the Court to dismiss the Plaintiff suit on grounds that he came to Court with unclean hands and cannot be afforded equity by a Court of equity.
13. In addition, he filed a further replying affidavit on 21.7.2015 in response to the amended originating summons in which he challenged the Plaintiff's refund in the Kshs 418,000/- as he paid Kshs 200,000/- only under the agreement. He sought damages on account of breach of contract and attached a rent assessment report prepared by a valuer to support his claim
14. The Plaintiff submitted that the Defendant did not discharge the burden of proof on the alleged forgery as the burden rests on him as contemplated under section 107 and 108 of the Evidence Act. That he did not produce a copy of the OB, a form P22 or a report of the outcome of the complaint. That he did not call witnesses including the drawer of the acknowledgement letter, the DCIO included. He submitted that in view of the lack of evidence to the contrary the acknowledgement letter that states that the Defendant received a total of Kshs 405,000/- from the Plaintiff is therefore genuine. He submitted that in addition to the said sums he paid Kshs 13,000/- making a total of Kshs 418,000/-.
15. The Plaintiff further submitted that the agreement for sale did not provide that time was of essence nor a penalty for any breach of contract. That the parties did not operate under strict time lines as none was provided for in the agreement. Reiterating that the Defendant did not obtain the consent to transfer as contemplated by clause 6 of the agreement, that the consent obtained was for subdivision which he did not involve the Plaintiff.
16. In addition the Plaintiff states that he is prepared to pay the balance of Ksh 82,000/- to the Defendant

being the balance of the purchase price. Maintaining that in view of the mandatory provisions of Section 7 of the Land Control Act, the Plaintiff sought a refund of Kshs 418,000/- together with interest at Court rates. Similarly, he argued that the said provision bars the Defendant's claim for damages for breach of contract. Equally he opined that the Defendants claim for mesne profits meets the same fate and fails.

17. The Defendant submitted that

“Section 8 of the Land Control Act Cap 302 is couched in mandatory terms and provides that a Land Control Board consent is valid for a period of 6 months. This statutory period is couched in mandatory terms such that this Honourable Court does not have jurisdiction to extend the time if the period lapses. Upon lapse of the 6 months period one has to make a fresh application before the board.

We humbly submit that the prayer for extension of time is untenable for the simple reason that the Plaintiff is asking the Court to re-write the contract he entered into with the Defendant. Secondly the Court does not have jurisdiction to extend time that is statutorily capped by law as per the provisions of Section 8 of the Land Control Act Cap 302.

As regards the prayer for refund of money, we humbly submit that He who comes to equity must come with clean hands. It's clear from the evidence on record that the Plaintiff was in clear breach of the terms of the agreement dated 4th June 2009. The Plaintiff admitted in cross examination that even as at the time he was testifying in Court he had not paid the entire purchase price. By that admission alone, it's crystal clear that the Plaintiff was in breach of the sale agreement and thus his hands are tainted. He is not deserving of the orders sought. We invite you my lady to find that there is no provision for default clause in the sale agreement The Plaintiffs claim for Kshs. 418,000/= together with interest at 20% is therefore without any basis and the same should be disallowed.”

18. The Defendant opined that section 8 of the Land Control Act is mandatory and does not permit the Court to extend the time for application of consent outside the 6-month period. That one has to make a fresh application before the board. Terming the prayer for extension untenable the Defendant argued that Courts cannot rewrite contracts entered into by parties. Secondly the Court is barred by statutory provisions in section 8 of the Land control Act to so extend the time.

19. As regards the prayer for refund the Defendant submitted that the Plaintiff breached the agreement by failing to pay the purchase price in full. Further that even if the contrary was not true, there is no provision for default clause in the agreement and so the Plaintiffs claim for refund in the sum of Kshs 418,000/- lacks basis and is for disallowing. That in any event the sum of Kshs 200,000/- should be forfeited in favour of the Defendant on account of continued use of the suit land from 2009 to date.

20. Maintaining that the Defendant only received the sum of Kshs 200,000/- he submitted that the Plaintiff has not proved in evidence that indeed he paid the sum of Kshs 218,000/- alleged and therefore his claim in that regard must fail. That the Defendant did not sign the acknowledgement letter which purported to state acknowledgement of Kshs 405,000/- and insists that his signature was forged.

21. Finally, he urged that Court that he is entitled to mesne profits in the sum of Kshs 6,000/- as shown in the rent assessment report prepared by Top Mark Valuers Limited and dated 15.7.15 and presented to Court in support of the claim.

22. The former Court of Appeal for Eastern Africa in **GANDY V CASPAR AIR CHARTERS LTD [1956] 23 EACA, 139 stated that;**

“[T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given”.

23. Also, in **GALAXY PAINTS CO LTD V FALCON GUARDS LTD [2000] 2 EA 385**, the Court of Appeal reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial Court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the Courts determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.

24. The Court notes that the Plaintiff in his amended Originating Summon amended his pleadings to raise only two issues for determination which are; whether in the alternative the Plaintiff is entitled to a refund of the purchase price in the sum of Kshs 418,000/- together with interest at 20%; who should pay the costs of the suit. It must be appreciated the claim for extension of time within which to apply for consent of the land control board was abandoned. The Plaintiff led evidence that he vacated the suit land in 2010 when the suit land was *interalia* sold by a public auction to a third party. I guess this may have prompted the amendments. I fail to understand why counsel for both parties made submissions which are contrary to the case before the Court. That notwithstanding the Court will determine the claim as pleaded.

25. It is not in dispute that the parties entered into an agreement of sale on the 4.6.2009 with the condition *interalia* that the parties would attend the land control board to obtain consent. It is therefore clear that the suit land being agricultural land is subject to the provisions of the Land Control Act and the parties no doubt appreciated that by making it a condition under clause 6 of the said agreement. It is also on record that the land control consent to transfer was not obtained.

26. The relevant provisions of the Land control Act that is to say section 6, 7, 22 are replicated below for ease of reference;

“6. (1) Each of the following transactions -

a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land, which is situated within a land control area;

b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

c. the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

2. For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

3. This section does not apply to –

a. the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

b. a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.

7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.

8. (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

22. Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, and any person –

a. pays or receives any money; or

b. enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.”

27. Being agricultural land, the transaction fell within the precepts of section 6(1) as a controlled transaction requiring consent of the land control board. The sale agreement under clause 6 provides that parties will obtain consent. The agreement having been signed on the 4.6.2009 follows that consent should have been obtained by the 4.6.2009. The Defendant has led evidence that he obtained consent to subdivide and was awaiting receipt of the full of purchase price so that he obtains the consent to transfer. He asserts that by obtaining the consent to subdivide he had complied with clause 6 of the agreement aforesaid. The Plaintiff argued that clause 6 of the agreement contemplated a consent to transfer and since the same was not obtained the Defendant was in breach of a condition of the agreement. That he could not complete payment unless and until this was obtained. That notwithstanding the provisions of section 6 of the Act are mandatory and it remains that no consent was obtained within 6 months to transfer the suit land and the same became void. The parties did not seek and obtain extension of time to apply for extension out of time as provided under clause 8 (1) above. As explained before this claim was abandoned when the plaint was amended.

28. As to whether in the alternative the Plaintiff is entitled to a refund of the purchase price in the sum of Kshs 418,000/- together with interest at 20%, this Court will be guided by the provisions of section 7 which provide for refunds of the monies without prejudice the section 22 which criminalises transaction carried contrary to section 6. Going by the provisions of section 22 both the Plaintiff and the Defendant are guilty of contravening the section by the Plaintiff paying monies to the Defendant and taking possession of the suit land and the Defendant by receiving monies pursuant to an illegal transaction.

29. The operating word in section 7 is “shall” to denote a mandatory command. It therefore follows that the Plaintiff is entitled recover the monies paid as civil debt. The next question is the quantum of monies paid by the Plaintiff to the Defendant. There have been arguments and counter arguments between the Plaintiff and the Defendant on how much the Plaintiff has paid the Defendant to date. The burden of proof rests with the Plaintiff. He must discharge that burden. The Plaintiff has stated that he paid Kshs 418,000/-. He has presented evidence of Kshs 200,000/- which is duly admitted by the Defendant. The sum of 218,000/- has been alleged to have paid through various means; that is to say in cash, by his wife, via Mpesa, and in the presence of the Defendants former advocate Mr Kinuthia. No evidence was led to show how the payments were made or whether it was indeed paid at all. The Plaintiff neither called any of the witnesses to verify his averments. The Defendant denied receipt of any monies and in particular the acknowledgement note that stated that he had acknowledged receipt of Kshs 405,000/-. In the circumstances the Court finds that the Plaintiff can only recover Kshs 200,000/- that has been proved.

30. It is trite law that Courts cannot rewrite contracts of the parties, the role of the Court is to interpret the contracts and determine the rights of the parties therein. I have scrutinised the agreement and I agree with

the Plaintiffs' counsel that it did not provide for essence of time or completion. The parties seem to be rewriting the agreement as an afterthought. For example, it is not true that the agreement provided that consent to transfer was to be obtained after completion of the purchase price. The agreement provided that the balance of the purchase price was payable by the 31/11/2009 or is it 30/11/2009?. As I have said going by section 6, the consent should have been obtained by 4.6.2009. Neither the full purchase price was paid nor the consent was obtained. The conclusion is that both parties were in breach of the contract.

31. In the case of **HIRANI NGAITHE GITHIRE V WANJIKU MUNGE [1979] KLR 50**, Chesoni, J. (as he then was), stated as follows at page 52:

“The position is simple and clear. Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The Courts cannot do that; for it is not for us to legislate but to interpret what parliament has legislated. So, in this case that agreement between the parties having been entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and, since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary land control board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the land control board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”

32. Once a transaction relating to agricultural land is held to be void, no complaints of any nature, such as trespass, remained to be resolved and that the words “void for all purposes” used in the statute must be interpreted to mean what they say. Section 7 bars the entertainment of mesne profits as pleaded by the Defendant. It is declined.

33. The Plaintiffs suit succeeds to the extent that he gets a refund of Kshs 200,000/- together with interest at Court rates until it is paid in full.

34. Both parties to pay their own costs of the suit.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 19TH APRIL, 2018.

J G KEMEI

JUDGE.